Supreme Court, U.S.
FILED
MAY 30 2003
OFFICE OF THE CLERK

No. 02-1270

In the Supreme Court of the United States

STEVEN E. PERLMAN, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a report of an investigation conducted by the Justice Department's Office of the Inspector General concerning alleged improprieties in the administration of an immigrant investor program was "compiled for law enforcement purposes," within the meaning of Exemption 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(7).

2. Whether public disclosure of the names and other identifying characteristics of third parties and witnesses in the Inspector General's report "could reasonably be expected to constitute an unwarranted invasion of personal privacy," within the meaning of Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 312 F.3d 100. The opinion of the district court (Pet. App. 15a-30a) is unreported.

JURISDICTION

The court of appeals entered its judgment on November 25, 2002. The petition for a writ of certiorari was filed on February 24, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Through the Freedom of Information Act (FOIA), 5 U.S.C. 552, Congress attempted "to balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 144 (1981). To that end, FOIA exempts from the government's general duty of disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

2. Petitioner submitted a FOIA request for a Report of Investigation (Report) prepared by the Office of the Inspector General of the Department of Justice (Inspector General). The Inspector General prepared the Report in response to allegations of impropriety on the part of certain officials of the former Immigration and Naturalization Service (INS), including former INS General Counsel Paul Virtue.[1] Those allegations concerned the EB-5 Investor Visa Program (Investor Program), which permits foreigners to obtain special visas for residence in the United States in exchange for a substantial monetary investment in businesses employing at least ten American workers. When certain conditions are met, the foreign investors can receive permanent resident alien status. See 8 U.S.C. 1186b. The Inspector General sought to determine whether

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[1] On March 1, 2003, certain functions formerly performed within the Department of Justice by the Immigration and Naturalization Service (INS), including the adjudication of immigrant visa petitions, were transferred to the Department of Homeland Security and assigned to its Bureau of Citizenship and Immigration Services. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 451(b), 116 Stat. 2196 (codified at 6 U.S.C. 271(b)).

certain INS officials, and particularly Virtue, had improperly given preferential treatment to former INS officials affiliated with visa investment companies that participated in the Investor Program. Pet. App. 3a.

3. Based on FOIA Exemptions 6 and 7(C), 5 U.S.C. 552(b)(6) and (7)(C), the agency denied petitioner's request for the Report.[2] Petitioner filed an administrative appeal and, before that appeal was resolved, filed suit under FOIA in federal district court seeking release of the Report. Pet. App. 4a.

After reviewing the Report in camera, the district court granted the government's summary judgment motion in part and denied it in part. Pet. App. 15a-30a. By the time that the district court ruled, the government had provided significant portions of the Report to petitioner, while redacting other portions pursuant to Exemptions 6 and 7(C). *Id.* at 17a-18a. The district court held that the Report satisfied Exemption 7's threshold requirement that it be a document "compiled for law enforcement purposes" because the Report was prepared in connection with an Inspector General investigation into whether Virtue had "committed acts that could subject [him] to criminal or civil penalties." *Id.* at 22a; see *id.* at 21a-22a. The district court further held that much of the redacted information contained in the Report was properly withheld under Exemptions 6 and 7(C). *Id.* at 24a-26a. As relevant here, the court explained that "[d]isclosure of the identities of individuals whose names have turned up in an investigation or who are the subjects of an investigation could

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[2] FOIA Exemption 6 authorizes the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

subject those individuals to embarrassment, harassment, or the stigma of being associated with a criminal or federal investigation." *Id.* at 25a.

4. The court of appeals affirmed in part and vacated and remanded in part. Pet. App. 1a-14a. The court of appeals "agree[d] with the district court that the [Report] was compiled for law enforcement purposes" and therefore satisfied Exemption 7's threshold requirement. *Id.* at 6a. Based on its own in camera inspection of the Report, the court of appeals concluded that the Report "was compiled in connection with an investigation by [the Office of Inspector General] into possible violations of law and, in particular, whether a certain employee, namely Virtue, committed acts that could subject that employee to criminal or civil penalties." *Id.* at 6a-7a.

In balancing the relevant private and public interests under Exemption 7(C), the court of appeals also agreed with the district court that witnesses and third parties possess strong privacy interests in not having their identities disclosed because "being identified as part of a law enforcement investigation could subject them to 'embarrassment and harassment.'" Pet. App. 9a (quoting *Halpern* v. *FBI*, 181 F.3d 279, 297 (2d Cir. 1999)). The court further explained that "[t]he public's interest in learning the identity of witnesses and other third parties is minimal because that information tells little or nothing about either the administration of the INS program or the Inspector General's conduct of its investigation." Pet. App. 9a. The court noted, as well, that "[t]he strong public interest in encouraging witnesses to participate in future government investigations offsets the weak public interest in learning witness and third party identities." *Ibid.* The court thus concluded that "the names of witnesses and third

parties, along with their identifying characteristics, were properly redacted" in this case. *Ibid.*

With respect to information in the Report concerning Virtue, however, the court of appeals found that the public interest in disclosure outweighed Virtue's privacy interests. Pet. App. 9a-13a. The court explained that Virtue "stands on different ground from witnesses and third parties to the investigation because of his status as the former INS General Counsel and the role he played in administering the [Investor] program." *Id.* at 9a. The court identified several factors as relevant "[i]n balancing a government employee's privacy interests against the public's interest in disclosure," *id.* at 10a, including (1) the government employee's rank, *ibid.*, (2) the "[d]egree of wrongdoing and strength of evidence against the employee," *ibid.*, (3) the "[a]vailability of other means to obtain the information," *id.* at 11a, (4) the degree to which the requested information "sheds light on government activity," *ibid.*, and (5) the extent to which the information is job-related, *id.* at 12a. The court found that each of those factors supported the disclosure of information pertaining to Virtue. *Ibid.*[3]

ARGUMENT

The court of appeals correctly applied established precedent to conclude that the Inspector General's Report qualifies as a law enforcement record and that the privacy interests of witnesses and third parties in avoiding release of their names and identifying information outweigh any public interest in disclosure. Those rulings do not conflict with any decision of this Court or

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[3] In April 2003, the government produced to petitioner the portions of the Report ordered released by the Second Circuit.

of any other court of appeals. Therefore, further review is not warranted.

1. Petitioner contends (Pet. 7-12) that the court of appeals erred in holding that the Inspector General Report was "compiled for law enforcement purposes" within the meaning of Exemption 7. In particular, petitioner argues (Pet. 9-10) that the court relied on a per se rule that all documents prepared by a federal Inspector General satisfy Exemption 7's threshold requirement. The court of appeals, however, applied no such per se rule. The court instead examined the Report in camera and concluded, based on the content and purposes of this particular Report and the circumstances under which it was prepared, that the Report was "compiled for law enforcement purposes," 5 U.S.C. 552(b)(7), because it "was compiled in connection with an investigation by [the Office of Inspector General] into possible violations of law and, in particular, whether a certain employee, namely Virtue, committed acts that could subject that employee to criminal or civil penalties." Pet. App. 6a-7a.

The court then supported its conclusion by reference to the factors applied by the D.C. Circuit in *Stern* v. *FBI*, 737 F.2d 84 (D.C. Cir. 1984), to determine on a case-by-case basis whether a particular investigation is for law enforcement purposes. Pet. App. 7a. The court quoted the appropriate factors as whether the investigation "focuses directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions." *Ibid.* (quoting *Stern*, 737 F.2d at 89). The court of appeals thus applied the very test that petitioner advocates (Pet. 8-9).

Petitioner also argues (Pet. 10-11) that the investigation described in the requested Report actually

focused on allegations of employee misconduct not rising to the level of civil or criminal wrongdoing. Both courts below, however, examined the Report in camera and reached a contrary conclusion. See Pet. App. 7a, 22a. Petitioner's challenge to the district court's and court of appeals' concurrent findings in that regard raises no question of law warranting this Court's review.

2. Petitioner also seeks (Pet. 12-21) this Court's review of the court of appeals' balancing of the public and private interests implicated by his request for the names and identifying information of witnesses and other third parties in the Report. That claim does not merit review.

Petitioner does not contend that the court of appeals' ruling or legal analysis conflicts with the decisions of any other circuit or with any decision of this Court. To the contrary, the court of appeals applied the exact balancing of public and private interests that this Court prescribed in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). In so doing, the court reached the same result that this Court has reached in every case where it has been confronted with a FOIA request seeking private information about third parties that is contained in government files: "[I]n none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen." *Id.* at 774-775; see also *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (per curiam); *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487 (1994).

Petitioner's contention that a different rule applies to government officials (Pet. 16-17) ignores *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976). In that case,

the FOIA request sought access to case summaries of honors and ethics hearings held by the United States Air Force Academy. This Court recognized the appropriateness under FOIA Exemption 6 of redacting identifying information about third parties and witnesses from those case summaries, even though those third parties were members of a military academy and not private civilians. *Id.* at 380-381.[4]

Petitioner asserts (Pet. 15) that disclosing the identities of third parties and witnesses who are government employees would "open agency action to the light of public scrutiny." Exemption 7(C), however, requires a greater showing than that the disclosure of private information would reveal agency action in some measure. The legally relevant question, which the court of appeals asked and answered (Pet. App. 9a), is whether the disclosure would "contribute *significantly* to public understanding of the operations or activities of the government." *Reporters Committee*, 489 U.S. at 775 (emphasis added). That is "the only relevant public interest." *FLRA*, 510 U.S. at 497; see also *Bibles* 519 U.S. at 355-356. The court of appeals correctly concluded that "[t]he public's interest in learning the identity of witnesses and other third parties is minimal because that information tells little or nothing about either the administration of the INS program or the

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[4] The claim to privacy is stronger in this case, which now involves only Exemption 7(C), than the Exemption 6 privacy claim at issue in *Rose*. Exemption 6 permits withholding only if disclosure "*would constitute a clearly unwarranted* invasion of personal privacy." 5 U.S.C. 552(b)(6) (emphasis added). The law-enforcement privacy exemption offers broader protection, exempting from disclosure those records that "*could reasonably be expected* to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C) (emphasis added).

Inspector General's conduct of its investigation." Pet. App. 9a.

Beyond that, petitioner's disagreement with the court of appeals' application of this Court's precedent to the "specific factual and legal circumstances presented in this case" (Pet. 21) is not the type of broad or enduring legal question that merits an exercise of this Court's certiorari jurisdiction. See *Board of Educ.* v. *McCluskey*, 458 U.S. 966, 971 (1982) (Stevens, J., dissenting) ("[T]his Court is not a forum for the correction of errors."); *Boag* v. *MacDougall*, 454 U.S. 364, 367-368 (1982) (Rehnquist, J., dissenting).[5]

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[5] On May 5, 2003, the Court granted the government's petition for a writ of certiorari in *Office of Independent Counsel* v. *Favish*, No. 02-954, which presents a question concerning the proper application of Exemption 7(C). Because the present petition simply seeks review of the court of appeals' application of established law to the "specific factual and legal circumstances presented in this case," Pet. 21, and does not raise any of the broader legal questions presented in the *Favish* petition, the Court's decision in the *Favish* case is unlikely to shed helpful light on the resolution of petitioner's claim. More specifically, because the court of appeals found that there was already a "substantial amount of evidence" suggesting impropriety in the operation of the INS program (Pet. App. 11a), this case does not present the question at issue in *Favish* of whether unsubstantiated allegations of governmental misconduct are sufficient to outweigh privacy interests under Exemption 7(C). The Court, accordingly, need not hold this petition pending the decision in *Favish*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2003